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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

FRANK P. ACOSTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether prosecutorial misconduct consisting of comments on the defendant's exercise of his Fifth Amendment right to silence and his Sixth Amendment right to counsel can be found not to have affected the defendant's substantial rights, when the outcome of the trial turned on the respective credibility of the witnesses, the misconduct occurred at a time when no answer could be made, and an initial trial terminated in a hung jury.

Whether a defendant may be deprived of counsel of choice in connection with the presentation of a motion for new trial based on a single sentence contained in a footnote of a motion for extension of time, which inadvertently neglected to state that *pro hac vice* counsel had been associated both for sentencing and all other post-verdict proceedings.

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner and the United States).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF ALL PARTIES	ii
TABLE OF CONTENTS	iii
INDEX TO APPENDIX	iv
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	1
JURISDICTION	1
STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF LOWER COURT JURISDICTION UNDER RULE 14.1(i)	4
REASONS FOR GRANTING THE WRIT	5
A. THE NINTH CIRCUIT'S RULING THAT PROSECUTORIAL MISCONDUCT DID NOT AFFECT THE PETITIONER'S SUBSTANTIAL RIGHTS DISREGARDS NOTIONS OF FUNDAMENTAL FAIRNESS, BECAUSE OF THE CRITICAL ROLE PLAYED BY WITNESS CREDIBILITY	5
B. THIS COURT SHOULD GRANT THE PETITION, BECAUSE THE NINTH CIRCUIT'S RULING DEPRIVED PETITIONER OF COUNSEL OF CHOICE BASED ON A MISREADING OF THE RECORD	12
CONCLUSION	15

INDEX TO APPENDIX

Page

A. Amended Ninth Circuit Memorandum Disposition ..... App. 1

B. Order Denying Petition for Rehearing and Rehearing En Banc ..... App. 6

C. Partial Reporter's Transcript of Closing Argument ..... App. 8

D. Application of Counsel to Appear Pro Hac Vice .... App. 13

E. Defendant's Motion to Continue Proceedings ..... App. 17

TABLE OF AUTHORITIES

Page

CASES

Berger v. United States, 295 U.S. 78 (1935) 6

Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983) 7

Greer v. Miller, 483 U.S. 756 (1987) 10

Griffin v. California, 380 U.S. 609 (1965) 7

Moore v. Morton, 255 F.3d 95 (3d Cir. 2001) 10

Olano v. United States, 507 U.S. 725 (1993) 12

United States v. Carroll, 678 F.2d 1208 (4th Cir. 1982) 7, 8

United States v. Combs, 379 F.3d 564 (9th Cir. 2004) 10

United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006) 12, 14

United States v. Pearson, 746 F.2d 787 (11th Cir. 1984) 7

United States v. Schuler, 813 F.2d 978 (9th Cir. 1987) 7, 9

United States v. Walters, 309 F.3d 589 (9th Cir. 2002) 12

United States v. Weatherspoon, 410 F.3d 1142 (9th Cir. 2005) 6, 10

United States v. Young, 470 U.S. 1 (1985) 9

STATUTES

18 U.S.C. § 371 2

18 U.S.C. § 1956(a)(1)(A)(i) 3

TABLE OF AUTHORITIES

Page

18 U.S.C. § 1956(a)(2)(A)(i) 3

18 U.S.C. § 3231 4

28 U.S.C. § 1291 4

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANK P. ACOSTA respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit issued on June 14, 2007, affirming the judgment of conviction and remanding for resentencing. The Ninth Circuit denied his petition for rehearing and for rehearing en banc the same day.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit affirming petitioner's sentence is unpublished and is attached as Appendix A to this petition. Appx. A at App. 1.

JURISDICTION

The amended judgment of the United States Court of Appeals for the Ninth Circuit affirming petitioner's judgment of conviction and sentence was entered on June 14, 2007. Appx. A. This Petition is filed within 90 days of the date the United States Court of Appeals for the Ninth Circuit denied petitioner's petition for rehearing. Appx. B at App. 6-7.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On February 26, 2004, a federal grand jury returned a second superseding indictment against petitioner Frank Acosta. Count 1 alleged that between January 1996 and January 2000, Mr. Acosta conspired to knowingly and willfully make materially false and fraudulent statements in a matter within the jurisdiction of the Department of Housing and Urban Development ("HUD"), and to devise a scheme to defraud and obtain money and property from commercial lending institutions by means of materially false and fraudulent pretenses, all in violation of 18 U.S.C. § 371. Counts 2-14 alleged false statements charges, based on the making of false statements in real estate financing documents. Counts 15-21 alleged a wire fraud scheme, that between January 1996 and January 2000, Mr. Acosta, aided and abetted by others, devised a scheme to defraud commercial lending institutions and HUD through the use

of materially false and fraudulent representations. E.R. 20. Finally, Counts 22-25 alleged that Mr. Acosta engaged in promotional money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and (2).

An initial trial concluded with a hung jury. A second trial, occurring between February 22, 2005, and March 9, 2005, resulted in the jury convicting petitioner Acosta of counts 1-25.

On June 13, 2005, the district court sentenced petitioner to 60 months' imprisonment. The court denied his motion for new trial on the same day.

On appeal, petitioner contended that he had been deprived of a fair trial, because the prosecutor committed misconduct by commenting on the petitioner's demeanor during closing rebuttal. The petitioner had not testified at the trial. Petitioner further argued that he was improperly deprived of his Sixth Amendment right to counsel of choice at sentencing and on the motion for a new trial, because the district court refused to allow an attorney to appear *pro hac vice*.

On February 27, 2007, a panel of the United States Court of Appeals for the Ninth Circuit affirmed the conviction, but vacated the sentence and remanded for resentencing.

Petitioner filed a timely petition for rehearing and for rehearing en banc. On June 14, 2007, the Ninth Circuit issued an Amended Memorandum Disposition which did not alter its prior rulings in any pertinent respect. Appx. A. In a separate order, the Court denied the petition for rehearing and for rehearing en banc. Appx. B.

In its Amended Memorandum Disposition, the Ninth Circuit ruled that the prosecutorial misconduct did not justify relief under the plain error doctrine. Appx. A. at App. 2-3. The court agreed that petitioner had been wrongly deprived of his Sixth Amendment right to counsel of choice at sentencing, and that such error was not harmless. The panel also ruled, however, that appellant was not entitled to a new hearing on a motion for a new trial, concluding that the attorney who was denied leave to appear *pro hac vice* sought to appear for sentencing only. Appx. A. at App. 5. Thus, the court concluded that the deprivation of counsel choice was limited to sentencing. *Id.* The court accordingly remanded for resentencing, but not for further post-trial proceedings or for a new hearing on the motion for a new trial. *Id.*

STATEMENT OF LOWER COURT JURISDICTION UNDER RULE 14.1(i).

The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231. The jurisdiction of the court below was invoked under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

A. THE RULING OF THE COURT BELOW, THAT PROSECUTORIAL MISCONDUCT DID NOT AFFECT THE PETITIONER'S SUBSTANTIAL RIGHTS, IMPROPERLY EMPHASIZED THE EVIDENCE PRESENTED BY THE GOVERNMENT, DISREGARDING BOTH THE EVIDENCE PRESENTED BY THE DEFENSE AND THE IMPORTANCE OF WITNESS CREDIBILITY TO THE OUTCOME OF THE TRIAL.

The Ninth Circuit concluded that the prosecutor committed misconduct during closing rebuttal when he commented on petitioner's demeanor. Nonetheless, the court concluded that any error was not plain, because there was substantial evidence of appellant's guilt. Appx. A at App. 3. Because this ruling placed an undue emphasis on the government's case, without fair consideration of the strength of the defense or the importance of witness credibility, this Court should grant petitioner's petition for writ of certiorari.

In closing rebuttal, the government negatively commented on petitioner's exercise of his Sixth Amendment right to counsel and his Fifth Amendment right not to testify. The prosecutor's argument also amounted to the improper introduction of character evidence against a nontestifying defendant. The prosecutor's precise argument was:

> And you saw . . . how involved the defendant is in his own defense. How he's in constant communication with his lawyer, finding documents, suggesting questions. Does this appear to you to be the master delegate [sic] that you've just heard

> about from the defense. Is he someone that would just pay no attention.

Appx. C at App. 11. By making this argument during closing rebuttal, in a case in which the credibility of the parties' respective witnesses was critical, the government attacked the defendant's credibility and character at a time and in a manner to which the defense could not respond.

Prosecutors are held to higher standards of conduct than are other lawyers, because their duty is to do justice, rather than to secure a conviction. *Berger v. United States*, 295 U.S. 78, 88 (1935). In 1935, this Court established the outer bounds for prosecutorial behavior:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88. It is fair to say that "the ethical bar is set higher for the prosecutor than for the criminal defense lawyer." *United States v. Weatherspoon*, 410 F.3d 1142, 1148 (9th Cir. 2005).

More than 40 years ago, this Court held that a prosecutor may not comment on the defendant's exercise of his right not to testify at trial. *Griffin v. California*, 380 U.S. 609, 613-14 (1965). The Court reasoned that because the defendant's right not to testify is protected by the constitutional privilege against self-incrimination, a prosecutor may not urge a jury to infer guilt from the defendant's exercise of that fundamental right.

The federal circuit courts have held consistently that a prosecutor's comment on the demeanor of a nontestifying defendant violates the prohibition against commenting on the defendant's right not to testify. *E.g.*, *United States v. Schuler*, 813 F.2d 978, 981-82 (9th Cir. 1987) (improper for prosecutor to comment on nontestifying defendant's laughter); *United States v. Pearson*, 746 F.2d 787, 796 (11th Cir. 1984); *United States v. Carroll*, 678 F.2d 1208, 1209-10 (4th Cir. 1982). While all circuits recognize the impropriety of such behavior, the Fourth Circuit has classified the problem as one involving the improper presentation of character evidence rather than improper comment on the exercise of the privilege against self-incrimination. *United States v. Carroll*, 678 F.2d at 1209-10. Regardless how comment on demeanor is classified, it is clear that such argument constitutes misconduct.

The Sixth Amendment guarantees to criminal defendants the equally fundamental right to counsel. Although this Court has not addressed the question, it logically follows that, as with exercise of the privilege against self-incrimination, exercise of the right to counsel cannot be held against the defendant. *See generally Griffin*, 380 U.S. at 614-15; *see also Bruno v. Rushen*, 721 F.2d 1193, 1194-95 (9th Cir. 1983). Argument in which a prosecutor urges

the jury to infer guilt from the defendant's exercise of his right to counsel, must violate the Sixth Amendment.

In *United States v. Carroll*, 678 F.2d 1208, the United States Court of Appeals for the Fourth Circuit reversed the defendant's conviction, applying a harmless error standard of review. There, in closing argument, the prosecutor argued to the jury:

> . . . and if you will recall, it was the defendant who was doing most of the pointing. It was the defendant who was explaining to his lawyer what the pictures were all about. It was the defendant who knew more about the pictures than the lawyer did. Now, I submit to you . . . the reason he knew so much about those pictures is because he was in the bank there at the robbery. That's the only reasonable explanation. If there was an explanation, an innocent explanation, as to why he knew more about the pictures than his lawyer did, I honestly don't know what it is.

Carroll, 678 F.2d at 1209. The prosecutor thus argued that the defendant's action of conferring with counsel regarding photographs was evidence of his guilt. Although the Fourth Circuit did not analyze the case as an improper comment on the defendant's exercise of his Sixth Amendment right to counsel, the court recognized the severe prejudice resulting from this type of commentary.

Similarly, in this case, the prosecutor's remarks during closing rebuttal attacked petitioner's character, his right not to testify, and his exercise of his Sixth Amendment right to counsel. As in *Carroll*, the prosecutor's comments asserted that the defendant's demeanor and his actions of conferring with counsel were evidence of guilt. Appx. C at App. 11. Indeed, the government contended

that petitioner's communication with his counsel showed that he possessed the knowledge necessary to be guilty of the charged offenses. *Id.* Whether petitioner possessed the requisite knowledge was the only disputed element of the offense and thus, the only question for the jury to resolve.

Although the prosecutor's comments in this case asserted that the defendant's demeanor proved that he was guilty, petitioner's consultation with counsel indicates neither intent nor knowledge. Certainly, consultation with counsel is far less indicative of intent than that of the defendant's laughter in *Schuler*. It was fundamentally improper to urge a jury to hold the defendant's constitutional right to consult with counsel against the defendant. Furthermore, the prosecutor's rebuttal argument, by attacking the defendant's demeanor, effectively commented on his failure to testify. The prosecutor plainly infringed petitioner's Fifth and Sixth Amendment rights.

Although defense counsel did not object to the prosecutor's comments on the defendant's demeanor, the misconduct affected the defendant's substantial rights, warranting reversal. The prosecutor committed serious misconduct, the prejudicial impact of which was increased because it occurred during closing rebuttal.

The Ninth Circuit held that because the government presented substantial evidence of guilt and a defense witness was impeached, any error was not plain. Appx. A at App. 3. Whether a constitutional violation affected the defendant's substantial rights cannot be judged based only on the strength of the government's case. There cannot be a blanket rule that whenever the government presents substantial evidence, the defendant cannot meet the plain error standard. *Cf. United States v. Young*, 470 U.S. 1, 19

(1985) (evidence overwhelming when no witness supported respondent's asserted defense). Rather, the question whether an error affected a defendant's substantial rights requires a full examination of the record, including matters such as the type of defense presented, the importance of credibility, and whether a specific curative instruction was given. *See Moore v. Morton*, 255 F.3d 95, 111-14 (3d Cir. 2001) (lack of specific curative instruction combined with inflammatory nature of remarks rendered error plain); *cf. Greer v. Miller*, 483 U.S. 756, 764-66 (1987) (prompt curative instruction ameliorated any prejudice).

When the jury decision about which witnesses are more credible is critical to the outcome, prosecutorial misconduct is far more likely to improperly affect the verdict. Circuit courts have held that when the credibility of witnesses is central, prosecutorial misconduct involving vouching requires reversal of the conviction. *E.g., United States v. Weatherspoon*, 410 F.3d at 1151; *United States v. Combs*, 379 F.3d 564, 574 (9th Cir. 2004). That principle should apply equally to the more serious misconduct of prosecutorial comment on the defendant's decision not to testify, the demeanor of the non-testifying defendant, and the defendant's consultation with counsel.

The Ninth Circuit's conclusion regarding the substantial nature of the evidence against the petitioner disregarded both the significant credibility problems of the government's witnesses and the fact that the initial trial, at which the same evidence was presented, ended in a hung jury. The record of this case belies the notion that because the government has presented substantial evidence, any error cannot be plain. While the government marshaled considerable evidence, that evidence was not overwhelming, but depended on the jury's assessment of

the credibility of the respective witnesses for the parties. The credibility battle was hardfought and central to the outcome of the case.

An examination of the record firmly establishes that the relative credibility of the parties' various witnesses was critical to the outcome of the trial. The government's case depended heavily on the testimony of multiple cooperating witnesses, all of whom were participants in the charged fraud, some of whom were charged and some of whom were not. The defense vigorously impeached these witnesses, both with inconsistent statements and testimony and with the witnesses' obvious bias. In opposition to this evidence, petitioner offered the testimony of several witnesses, including his wife, Ms. Madrigal, who had pleaded guilty to the charges. The government, in turn, impeached her. Petitioner's defense turned on whether the jury believed the government's witnesses or petitioner's witnesses, some of whom provided positive character evidence. Thus, the outcome of the trial turned on the jury's view of witness credibility: whether the jury believed the government's cooperating witnesses, all of whom had received or hoped to receive significant benefits for their cooperation, or the defense witnesses, one of whom was biased in petitioner's favor.

That some of the defense witnesses provided testimony about their positive experiences with Mr. Acosta's honesty also shows that the misconduct prejudiced the petitioner's substantial rights. When the prosecutor attacked petitioner's demeanor and consultation with counsel as demonstrative of guilty knowledge, the government struck at the heart of the defense case, effectively undermining petitioner's character and credibility. Because witness credibility and petitioner's character were central, the

misconduct during closing rebuttal had a greater impact than it might have had in a different trial. The prosecutor effectively asserted that the defendant himself and the defense as a whole were not credible. The prosecutor's misconduct tipped the balance in favor of conviction. *See Olano v. United States*, 507 U.S. 725, 734 (1993).

In this case, the government's attack on petitioner's exercise of constitutional rights necessarily affected his substantial rights. Accordingly, this Court should grant the petition for writ of certiorari to consider if a government attack on petitioner's character, based on his exercise of constitutional rights, can be insubstantial when witness credibility is central to the outcome of the case.

B. THIS COURT SHOULD GRANT THE PETITION, BECAUSE THE NINTH CIRCUIT'S RULING DEPRIVED PETITIONER OF COUNSEL OF CHOICE BASED ON A MISREADING OF THE RECORD.

The Ninth Circuit agreed that petitioner was deprived of his Sixth Amendment right to counsel of choice and that the error was not harmless, relying on the Ninth Circuit case of *United States v. Walters*, 309 F.3d 589, 592-93 (9th Cir. 2002).[1] The court concluded, however, that the deprivation went only to sentencing, finding that the

[1] Because the Ninth Circuit concluded that the deprivation of counsel of choice was not harmless under circuit precedent, the court did not consider whether this Court's holding in *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006) overruled *United States v. Walters*, 309 F.3d 589. The *Walters* decision held that harmless error analysis applied to the wrongful deprivation of counsel of choice at sentencing.

services of counsel of choice were sought only for that purpose. Appx. A. at App. 5. In so ruling, the panel relied on a single sentence contained in a footnote in petitioner's Motion for Continuance, filed to obtain a continuance of the sentencing hearing. Appx. E at App. 18. The Ninth Circuit's ruling is unsupported by the record and affirms the deprivation of the qualified right to counsel of choice in connection with a critical stage of the criminal proceeding.

Petitioner retained attorney Alan Ellis to represent him in all post-conviction proceedings in the district court. Petitioner did not enter into a limited retainer agreement with Mr. Ellis, and Mr. Ellis did not seek leave to represent petitioner only at sentencing. In accord with the local rules of the Central District of California, attorney Ellis filed an Unopposed Application for Order to Appear *Pro Hac Vice*. Appx. D. Counsel's application to appear *pro hac vice*, which was signed by counsel of record Andrew Stein, did not indicate in any way that he sought to appear only at sentencing or for some other limited purpose. *Id.*

The sole source for the court's ruling that Mr. Ellis was retained to appear only at sentencing was footnote 3 of petitioner's Motion for Continuance, filed on June 2, 2005. Appx. E at App. 18. In that footnote, counsel of record casually stated that petitioner had associated additional counsel for sentencing, namely the Law Offices of Alan Ellis. *Id.* This statement appears to have been made as shorthand and was incomplete. More important, the footnote did not state that counsel was retained for sentencing *only*. *See id.*

The Ninth Circuit also noted that petitioner filed his Motion for New Trial ten days before the district court denied the motion for *pro hac vice* status. Appx. A. at App.

5. This fact does not change the outcome. The motion to continue sought additional time to prepare both for the motion for a new trial and for sentencing. The motion specifically referenced the defense's need for additional time to prepare for the hearing on the motion for a new trial. Appx. D at App. 21-23. Moreover, the hearing on the motion for new trial was held on the day of sentencing at which counsel of choice was barred from appearing. As with sentencing, petitioner was deprived of counsel of choice in developing, presenting and arguing the motion for a new trial.

The record, viewed as a whole, demonstrates that Mr. Ellis was retained to participate in all post-trial proceedings in the district court. His motion for leave to appear *pro hac vice* did not contain any limitation on his proposed representation. Indeed, Mr. Ellis was retained both because of his expertise at sentencing and because of his familiarity in presenting claims of ineffective assistance of counsel. Notably, attorney Karen Landau, who appeared in Mr. Ellis' place at the hearing in question (but was not counsel of choice), participated in both the motion for a new trial and at sentencing.

The Ninth Circuit's decision that the denial of counsel of choice did not extend to representation at the motion for a new trial is plainly mistaken. The denial of counsel of choice in connection with the bringing and presentation of a motion for a new trial is not amenable to harmless error analysis. *United States v. Gonzalez-Lopez*, 126 S. Ct. at 2565. Rather, like the denial of counsel of choice at trial, the error is structural. This Court should grant the petition for certiorari and vacate the Ninth Circuit's decision, with instructions to remand the case to the district court for consideration of a motion for new trial and resentencing.

CONCLUSION

For all the reasons discussed in this petition, petitioner prays that the Court grant a writ of certiorari to consider Question 1. In the alternative, petitioner prays the Court to grant a writ of certiorari and summarily vacate the judgment of the United States Court of Appeals for the Ninth Circuit with instructions to remand the case for consideration of a motion for new trial, at which proceeding petitioner will be represented by counsel of choice.

Dated: September 5, 2007

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FRANK ACOSTA, Defendant-Appellant.	No. 05-50477 D.C. No. CR-02-00390-DT AMENDED MEMORANDUM* (Filed Jun. 14, 2007)

Appeal From The United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted October 17, 2006
Pasadena, California

Before: GIBSON**, FISHER, and CALLAHAN, Circuit Judges.

Appellant was convicted by a jury on a multiple-count indictment involving a scheme to defraud the Department of Housing and Urban Development (HUD) by providing fraudulent home loan applications to HUD-endorsed lenders to secure the sale of several residential properties. He appeals his conviction advancing claims of prosecutorial

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

misconduct. He also challenges the district court's denial of a pro hac vice motion – filed by Alan Ellis, Esq., an attorney licensed only in Pennsylvania but living in California – to represent him at sentencing. We affirm appellant's conviction but vacate his sentence and remand for resentencing.

Prosecutorial Misconduct Claims

Any evidentiary errors made by the prosecution during its examination of witnesses Gonzalez, Current, and Madrigal do not amount to reversible prosecutorial misconduct or vouching. *See United States v. Meling,* 47 F.3d 1546, 1558 (9th Cir. 1995) (holding that inadmissible character evidence sought by the prosecution, standing alone, does not amount to prosecutorial misconduct, citing to *United States v. Yarbrough,* 852 F.2d 1522, 1539 (9th Cir. 1988)); *United States v. Berry,* 627 F.2d 193, 197-98 (9th Cir. 1980) (explaining that a timely instruction from the judge usually cures the prejudicial impact of inadmissible evidence unless the instruction is inadequate or the evidence is highly prejudicial).

We recognize that the government violated appellant's Fifth Amendment right to be convicted solely on the evidence adduced at trial, under *United States v. Schuler,* 813 F.2d 978, 981-82 (9th Cir. 1987), by commenting in its closing argument on appellant's demeanor in the courtroom throughout the trial. However, unlike in *Schuler,* appellant's counsel failed to object to the error. Therefore, appellant must overcome a heightened standard of review that of plain error. *See United States v. Geston,* 299 F.3d 1130, 1134-35 (9th Cir. 2002) (applying plain error review

to alleged prosecutorial misconduct claim where appellant failed to raise issue at trial).

Because there was substantial evidence of appellant's guilt, the prosecutor's improper comment during his rebuttal closing argument was not plain error. The government presented evidence from three coconspirators, a tape-recorded admission to one illegal transaction through a fourth witness, and financial documents, including loan documents and checks signed by appellant and deposited into his personal investment account. Moreover, the loan documents in evidence refuted the testimony of appellant's girlfriend that she was committing fraud motivated by commissions she received on the illegal sales transactions. Accordingly, appellant has failed to establish that the Fifth Amendment violation affected his substantial rights or the "fairness, integrity, or public reputation" of the trial, or resulted in "a miscarriage of justice." *See id.* at 1135 (citations omitted).

Nor do the government's evidentiary errors – considered cumulatively with the prosecutor's unconstitutional closing remark – require reversal because the cumulative errors were harmless.[1] Based on the overwhelming evidence of guilt in this case, we conclude that the errors did

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[1] The evidentiary errors here are subject to nonconstitutional harmless error review. While the prosecutor's closing remarks constituted constitutional error, appellant failed to preserve the error. Therefore, our standard of review of the cumulative error is unclear. *See United States v. Weatherspoon*, 410 F.3d 1142, 1151 (9th Cir. 2005) (reversing under heightened plain error review when only some error was preserved at trial, thereby avoiding deciding whether harmless error or plain error review applies to cumulative error). Because we affirm under the standard of review most favorable to appellant, we do not decide which standard of review applies to the review of cumulative error.

not materially affect the verdict. *United States v. Seschillie,* 310 F.3d 1208, 1214 (9th Cir. 2002) (explaining that nonconstitutional error warrants reversal only when it is more probable than not that the error materially affected the verdict) (internal citation omitted).

Appellant's Right to Counsel at Sentencing

We agree with appellant that, under *United States v. Walters,* 309 F.3d 589 (9th Cir. 2002), he was deprived of his right to counsel of choice under the Sixth Amendment when the district court denied the motion of Alan Ellis, Esq., to represent him for sentencing pro hac vice. While the district court explained its reason for denying Ellis's motion, the reason was not based on judicial administration considerations, but rather on Ellis's ongoing practice of law in federal court in California through pro hac vice applications. The district court's reason for denying Ellis's motion was squarely rejected in *Walters. See id.* at 592.

We also agree with appellant that the error was not harmless beyond a reasonable doubt.[2] Contrary to the situation in *Walters,* appellant was sentenced above the advisory guideline minimum and he unsuccessfully argued for a downward departure. Moreover, the district court's sentencing authority is now completely discretionary. *See United States v. Booker,* 543 U.S. 220 (2005). Therefore, the government failed to prove that appellant's

[2] Because we hold that the district court's error was not harmless, we do not decide whether *United States v. Gonzalez-Lopez,* 126 S.Ct. 2557 (2006) (holding that the denial of right to counsel of choice at trial is structural error not subject to harmless error review), overrules our holding in *Walters* that harmless error review applies to the denial of counsel of choice at sentencing.

deprivation of the counsel of his choice at sentencing did not contribute to a sentence greater than he would have received had he been represented by Ellis. *See Chapman v. California,* 386 U.S. 18, 24 (1967) (placing the burden to establish harmlessness of constitutional error on the beneficiary of the error); *Walters,* 309 F.3d at 593 (internal citations omitted).

We vacate appellant's sentence and remand for resentencing. We do not remand for the district court to reconsider appellant's motion for a new trial. Acosta's counsel of record who filed the new trial motion represented to the court that appellant's association with Ellis was for sentencing purposes, and in any case that motion was filed ten days before Ellis's pro hac vice application was denied.

Appellant's conviction is **AFFIRMED.**

Appellant's sentence is **VACATED** and this case is **REMANDED** for resentencing.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FRANK ACOSTA, Defendant-Appellant.	No. 05-50477 D.C. No. CR-02-00390-DT Central California ORDER (Filed Jun. 14, 2007)

Before: GIBSON*, FISHER, and CALLAHAN, Circuit Judges.

The memorandum disposition filed in this case on February 27, 2007, is hereby amended. The attached amended memorandum disposition is filed concurrently with this order.

Judges Fisher and Callahan have voted to deny the petition for panel rehearing and the petition for rehearing en banc. Judge Gibson has voted to deny the petition for rehearing and recommended denial of the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(a).

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* The Honorable John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

The petition for panel rehearing and for rehearing en banc is DENIED. No further petitions for panel or en banc rehearing will be entertained.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. FRANK ACOSTA, Defendant.	) CASE NO: CR 02-390(B)-DT) CRIMINAL) Los Angeles, California) Wednesday, March 9, 2005) (9:31 a.m. to 11:57 a.m.)) (1:27 p.m. to 4:42 p.m.)

JURY TRIAL – TWELFTH DAY

BEFORE THE HONORABLE DICKRAN TEVRIZIAN,
UNITED STATES DISTRICT COURT JUDGE

Appearances: (See next page)

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

* * *

[88] reasonable doubt as to whether the defendant acted with the intent to defraud or acted in good faith, you must acquit the defendant of all the charges.

Thank you, ladies and gentlemen.

THE COURT: Mr. Shallman.

REBUTTAL ARGUMENT FOR THE PLAINTIFF

MR. SHALLMAN: Did he act in good faith, ladies and gentlemen when he told Estella Moriel not to worry about it. That she was on welfare, couldn't afford this property, didn't have a down payment. Did he act in

good faith when he told JoAnn and Guadalupe Salinas that he would take care of everything. It didn't matter if they didn't have any money, didn't earn any income, didn't have a down payment. Did he act in good faith when he wrote $1,000 check, Exhibit 105 to Matt Dunne for buyer's info just a couple of days after that property on East 14th Street closed. Was he acting in good faith when he wrote $1,000 check in his own hand to Willie Rocha for Willie Rocha to sign papers for a property that he knew Willie Rocha couldn't afford?

And then was he acting in good faith when he met with Willie Rocha and said, "The only way they can nail me is if my cousin says . . . " this, this and this?

That's not good faith, ladies and gentlemen. It's not even close.

You know, when I'm not stuck in the middle of a four [89] week HUD trial, one of the things I like to do is watch college basketball. So, I'm so good with that remote control. And one of the things you will see when you watch college basketball games or someone's player is about to take a free throw, the easiest shot in the game, standing up at the line and you look behind the basket and all the students from the other school are behind the basket. And they're waving signs. They're screaming and hollering. They're shaking balloons. They're blowing horns. Doing whatever they can to distract the shooter. And that's what's going on here, ladies and gentlemen. That's what it reminded me of listening to the defense argument in this case. Because it is an easy shot in this case. It is an easy shot.

This was the defendant's company. So, it was a two person company. The counsel talks about a division of

labor in this company like it was GM or IBM where you've got the investment division in Detroit. You've got sales in Atlanta. This was a two person operation out of a store front on Union Pacific Avenue in Los Angles. Two people, the defendant and his girlfriend, later to become his wife and he wants you to believe that he didn't know what she was doing.

He was a partner in a mortgage company, Access America with Gerry Current. He wants you to believe he doesn't know there are wires – wire transmissions in the course, in the ordinary course of business in a real estate transaction.

[90] He received all the proceeds of this transaction.

Take a step back and look at what happened here. At the end of these deals, he got the money, he divided up the proceeds. No dispute about that. It was the defendant who had the most to gain from this fraud.

It was the defendant, who every witness who knew anything about that company, came in here and said, "Who was in charge of the office, the defendant."

Not Betty, she wasn't off, run amuck on her own, do whatever it was she wanted to do. The defendant was in charge. He was the one that told her what to do. It doesn't matter whether he signed or she signed those HUD Ones, those certifications.

You know, we've heard about a hand writing analysis that was done. It came out inconclusive. So, what. There's no dispute that the defendant signed two of the seven Ones that are charged. Betty signed the rest. When the defendant was in the office, he signed them. When he was

out of the office, she signed them for him. It doesn't make a difference. She did it on his behalf.

But, doesn't it make sense. A simple explanation. Doesn't it make sense when he wasn't in the office, she had the authority to go sign for him.

It was the defendant, ladies and gentlemen, whom witnesses with not [sic] motives to lie, no motives to get up here [91] and tell you anything but the truth, who said that when the defendant – it was the defendant who told them that there would be nothing wrong with them purchasing a property when he surely knew otherwise.

And you saw, in this case, sitting here (indicating) in this courtroom how involved the defendant is in his own defense. How he's in constant communication with his lawyer, finding documents, suggesting questions. Does this appear to you to be the master delegate that you've heard about from the defense. Is he someone that would just pay no attention. Be the boy in the bubble, didn't know what was going on in his own company.

You really do have an easy shot to make here. And the defense is behind the basket. They're waving signs, saying things about appraisals that really aren't at issue. Saying things about Notaries where – whether Estella Moriel signed a Notarized document which doesn't dispute she signed documents six years ago.

And then the ultimate distraction, the ultimate sign that they're waving trying to distract you is the defendant's wife. And Counsel suggested, do you have any reason not to believe her? Do you have any reason? Any evidence that you shouldn't believe her?

Well, think about it. Consider the multiple stories she told about just one Exhibit, Exhibit 124. This was the log

* * *

APPENDIX D

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Attorneys for Defendant
FRANK ACOSTA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. FRANK ACOSTA, Defendant.	**Case No.: CR 02-390 (B)-DT** **UNOPPOSED APPLICATION OF ALAN ELLIS FOR ORDER TO APPEAR PRO HAC VICE (Local Rule 2.3.2)** **[No hearing requested.]** **Place: Roybal Federal Building, Courtroom 880**

TO THE HONORABLE DICKRAN TEVRIZIAN:

1. I, Alan Ellis, hereby apply to the Court under Local Rule 2.3.2 for permission to appear and participate in the above captioned matter on behalf of Defendant, Frank Acosta, by whom I have been retained.

2. I am the founding partner of the Law Offices of Alan Ellis whose offices are located at 910 Irwin Street, San Rafael, California 94901, telephone number: (415) 460-1430, facsimile number: (415) 460-1630. My residence address is 406 Hilldale Way, Mill Valley, California 94941, telephone number: (415) 389-7925, facsimile number: (415) 388-4051.

3. I am of good moral character and have been retained by Mr. Acosta to appear in this Court on his behalf.

4. I am a member in good standing of the bars of the following courts:

Court	Date
Supreme Court of Pennsylvania – PA Bar No. 17430	1968
U.S. District Court for the Northern District of California	1987
U.S. District Court for the Eastern District of Pennsylvania	1969
U.S. District Court for the Middle District of Pennsylvania	1975
U.S. District Court for the Western District of Pennsylvania	1999
U.S. District Court for the Northern District of New York	
U.S. District Court for the District of Colorado	1999
Court of Appeals for the Second Circuit	1986
Court of Appeals for the Third Circuit	1980
Court of Appeals for the Fourth Circuit	1989
Court of Appeals for the Fifth Circuit	1983
Court of Appeals for the Ninth Circuit	
Court of Appeals for the Tenth Circuit	1988

Court of Appeals for the Eleventh Circuit	1982
Supreme Court of Pennsylvania	1978

5. I have been previously granted leave to appear *pro hac vice* [or the reasons set forth below in ¶ 12] [sic] in the case of *United States v. Ismael Jimenez,* No. 99-1274 (RCWL).

6. I reside within the jurisdiction of the United States District Court for the Northern District of California. My office address is 910 Irwin Street, San Rafael, CA 94901.

7. I am not a member of the bar of the United States District Court for the Central District of California.

8. I am not currently suspended or disbarred in any other court.

9. I designate Andrew Stein, Esquire, an attorney who is a member of the bar of this Court and who maintains an office within this district, as local counsel with whom the Court and opposing counsel may readily communicate regarding the conduct of the case and upon whom papers may be served:

   Andrew M. Stein, Esq.
   9944 Flower Street
   Bellflower, CA 90706
   (562) 866-9762

10. This case will not be delayed by the granting of applicant's application.

11. The government does not oppose the granting of this application.

12. Frank Acosta is entitled under the Sixth Amendment to have Alan Ellis appear pro hac vice as counsel for him. *United States v. Walters,* 309 F.3d 589 (9th Cir. 2002) (local rule including pro hac vice admission to attorney who resides in California, is regularly

employed in California, or is regularly engaged in business, professional or other activities in California violates the Sixth Amendment by denying him the right to be represented by privately retained counsel of choice).

I declare under penalty of perjury that the foregoing is true and correct and that I am familiar with the local rules, the local criminal rules, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence.

Dated this 27th day of May, 2005.

Respectfully Submitted,

LAW OFFICES OF ALAN ELLIS

By: /s/ Alan Ellis
ALAN ELLIS
Attorney for Defendant
FRANK ACOSTA

I hereby consent to the foregoing designation.

DATED: 5-27-05

LAW OFFICES OF ANDREW M. STEIN

By: /s/ Andrew M. Stein
ANDREW M. STEIN
Attorney for Defendant
FRANK ACOSTA

APPENDIX E

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FRANK ACOSTA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. FRANK ACOSTA, Defendant.	**Case No.: CR 02-390(B)-DT** **MOTION FOR CONTINUANCE** **Date: June 13, 2005** **Time: 1:30 p.m.** **Place: Roybal Federal Building, Courtroom 880**

TO THE HONORABLE DICKRAN TEVRIZIAN AND TO THE UNITED STATES ATTORNEY DEBRA W. YANG AND ASSISTANT UNITED STATES ATTORNEY DANIEL SHALLMAN:

PLEASE TAKE NOTICE that on June 13, 2005, at 1:30 p.m., or as soon as the matter may be heard in

Courtroom 880 of the above-entitled Court, located at 255 E. Temple Street, Los Angeles, California, defendant FRANK ACOSTA, by and through his attorney of record, Andrew M. Stein, will respectfully move to continue his sentencing for 45 days. A continuance is necessary to adequately prepare for sentencing. A continuance also is necessary to adequately develop the factual basis for the Motion for New Trial, filed May 27, 2005. In short, a continuance is needed so that the defendant is not deprived of the effective assistance of counsel at sentencing. *See United States v. Nguyen,* 262 F.3d 998, 1002 (9th Cir. 2001); *United States v. Mejia,* 69 F.3d 309, 314-15 (9th Cir. 1995).

Mr. Acosta was convicted of multiple counts after a jury trial which occurred between February 15, 2005, and March 10, 2005. After Mr. Acosta developed doubts as to the conduct of his attorney and the involvement of a disbarred attorney, Michael Kenney, he retained new counsel, Andrew Stein, on March 31, 2005.[1] Since that time, counsel has begun reviewing the trial transcript, and conducting a preliminary investigation into the facts of this case. Although Mr. Stein was able to obtain a recording of the trial, he still has not been able to obtain a complete transcript of the trial.

New counsel have identified a number of areas that require development in order to adequately prepare for sentencing. New counsel also have filed a Motion for a New Trial which requires further development and investigation. For these reasons, detailed further below, Defendant requests a continuance of sentencing.

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[1] Defendant also has associated additional counsel for sentencing, the Law Offices of Alan Ellis.

Generally, a district court should consider four factors in deciding whether to grant a requested continuance, (a) the extent of the movant's diligence in attempting to be prepared in time for the scheduled hearing; (b) the likelihood that the continuance will be useful; (c) the extent to which granting the continuance will inconvenience the court and the opposing party; and (d) the extent to which the defendant may be prejudiced by a denial of the continuance. *United States v. Flynt,* 756 F.2d 1352, 1358-60 (9th Cir. 1985), *amended,* 764 F.2d 675. Potential prejudice is the most significant factor in the equation. *Mejia,* 69 F.3d at 316.

All four of these factors support a grant of the continuance. Since being retained, undersigned counsel have diligently attempted to prepare for sentencing and to prepare a comprehensive motion for new trial. Counsel were impeded by obstacles that were outside of counsel's control, namely the lack of a trial transcript and the lengthy delays by former counsel in producing the defendant's files to new counsel. The undersigned counsel did not receive all of former counsel's files until April 25, 2005, and did not receive any of them until the first week of April.

Second, a continuance will be useful, because it will allow counsel to conduct the necessary investigation, including interviewing witnesses who were not interviewed by former counsel. A continuance also will allow counsel to obtain defendant's medical records and have the defendant and his children evaluated by mental health professionals.

Third, a 45-day continuance will not severely inconvenience either the court or opposing counsel. A continuance will not inconvenience government witnesses. While the undersigned is aware that this Court has announced his retirement from the bench, 45 days is still before the scheduled date. Further, a continuance at this time may actually be in the interests of judicial economy if it can obviate the later filing of a § 2255 motion. Finally, there is a reasonable probability that absent a continuance, Mr. Acosta will be prejudiced, both in terms of an adequate presentation at sentencing and in regard to a fully developed Motion for New Trial

1. A Continuance is Needed for Sentencing.

At present, Mr. Acosta is scheduled to be sentenced on June 13, 2005. Defendant's sentencing memorandum is due June 3, 2005. The defense cannot adequately prepare its sentencing memorandum by June 3, 2005. After a preliminary review of the record, the defense became aware of matters that may affect sentencing, which had not been previously investigated. For example, the defense has learned that prior to the offense conduct, Mr. Acosta had experienced severe panic attacks with some regularity. Mr. Acosta has a history of head injury. His medical history necessitates obtaining his medical records.

Moreover, the defense also is in the process of having a child psychologist interview and evaluate Mr. Acosta's children to determine the effect of Mr. Acosta being imprisoned while their mother is still in custody. The Acosta children already have suffered as a result of their mother being incarcerated.

The defense also is conducting an investigation into Mr. Acosta's personal history to identify mitigating factors that may support a sentence outside the sentencing guideline range. *See* 18 U.S.C. § 3553(a). The defense also is exploring whether any factors support a downward departure from the sentencing guidelines. Because former counsel conducted no exploration into any factors that might support a sentence outside of the relevant guideline range, the defense needs a continuance in order to adequately represent Mr. Acosta at sentencing.

A continuance also is appropriate, because Mr. Acosta needs neck surgery. His surgeon has recommended that he undergo cervical fusion in the area of C-4 to C-7 to relieve what is currently a chronically painful situation. Mr. Acosta has received two epidural injections in the past six months, but this has not alleviated the problem. It would be to the benefit of both Mr. Acosta and the United States taxpayer, if Mr. Acosta could undergo surgery before surrendering to serve his term of imprisonment. That would allow Mr. Acosta to obtain the services of his own surgeon at private expense, at a cost savings to the taxpayer.

2. A Continuance is Needed For the Motion for A New Trial.

The defense also needs a continuance in order to more adequately present the Motion for New Trial, filed on May 27, 2005. The Motion for New Trial is based primarily on the ineffective assistance of trial counsel and on the claim that notwithstanding the colloquy conducted by this Court, Mr. Acosta was not adequately informed regarding of the conflict of interest inherent in Mr. Ramsey representing both him and Kelli Davis.

It is well-established that to show ineffective assistance of counsel, the defendant must show both the deficient performance by counsel and prejudice. A showing of prejudice requires a demonstration that had counsel not performed deficiently, there is a reasonable probability that the outcome would have been more favorable to the defendant. Here, the claim of ineffective assistance is based largely on activities that counsel did not undertake at trial. This includes the failure to adequately impeach prosecution witnesses, possibly the most important function of cross-examination. *See Berryman v. Morton,* 100 F.3d 1089, 1097-98 (3d Cir. 1996)(counsel's failure to impeach eyewitness identification with prior inconsistent statements was constitutionally ineffective); *United States v. O'Neil,* 118 F.3d 65, 73 (2d Cir. 1997).

The claim of ineffective assistance of counsel also is based on the failure to investigate, interview, and call defense witnesses. Counsel is required to reasonably investigate possible defense witnesses, or make a reasonable decision that further investigation is not warranted. *See Strickland v. Washington,* 466 U.S. 668 (1984). Here, defense counsel did not conduct a reasonable investigation, because he failed to interview even one of a list of 35-40 potential defense witnesses. Counsel also did not act reasonably, because he failed to investigate whether there was exculpatory handwriting evidence. The suggestion that such evidence existed was plainly available from the discovery produced by the prosecution. Counsel did not act reasonably, because he failed to present character witnesses. However, defendant Acosta cannot demonstrate prejudice without interviewing potential defense witnesses and obtaining affidavits. *See Rios v. Rocha,* 299 F.3d 796,

810 (9th Cir. 2002); *Brown v. Myers,* 137 F.3d 1154, 1157-58 (9th Cir. 1998).

Defendant also is developing additional factual support to show that his waiver of the potential conflict of interest was unintelligent, because he did not in fact receive the advisements allegedly given by counsel. Possibly even more significant is the fact that while Mr. Ramsey acted as defendant's attorney in court, the defense was developed and run by disbarred attorney Michael Kenney, who purported to act as a paralegal.

Undersigned counsel acknowledges that he advised the court he could be ready for sentencing on June 13, 2005. At the time he was retained and made that representation, however, he was unaware of the full extent of the work that remain [sic] to be done. Therefore, based on the foregoing argument, Defendant Frank Acosta respectfully requests a 45-day continuance of sentencing. A 45-day continuance will allow the defense to adequately prepare for sentencing. The continuance also will allow the defense to adequately present the facts underlying the Motion for New Trial. Dated this 1st day of June, 2005.

Respectfully Submitted,

LAW OFFICES OF ANDREW M. STEIN,
AND LAW OFFICES OF ALAN ELLIS

By: /s/ Andrew M. Stein
ANDREW M. STEIN
Attorney for Defendant
FRANK ACOSTA